Case No. 13-3681

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FREE SPEECH COALITION, INC., *et al.,*

Plaintiffs - Appellants,

– vs –

ATTORNEY GENERAL OF THE UNITED STATES,

Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of Pennsylvania

PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel's decision upholding 18 U.S.C. §§ 2257, 2257A, as content-neutral regulations of expression, conflicts with *Reed v. Town of Gilbert*, No. 13-502 (U.S. Sup. Ct. June 18, 2015). Its determination that the statutes are narrowly tailored and not substantially overbroad also conflicts with *McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *United States v. Stevens,* 559 U.S. 460 (2010); and *Conchatta v. Miller*, 458 F.3d 258 (3rd Cir. 2006). The consideration of the full Court is necessary to secure and maintain uniformity of its decisions.

Moreover, this appeal involves a question of exceptional importance: Under the First Amendment, can the government impose recordkeeping, labeling, and inspection requirements on producers and publishers of sexual imagery in the name of protecting children from sexual exploitation, when a substantial quantity of the expression burdened by those requirements depicts mature adults who could not be confused as minors and comprises private, personal images exchanged between adults?

Finally, rehearing should be granted so the Supreme Court's decision in *City of Los Angeles v. Patel,* No. 13-1175 (U.S. Sup. Ct. June 22, 2015), can be taken into account on the Fourth Amendment claims advanced in this case.

REASONS FOR GRANTING REHEARING

I. REHEARING SHOULD BE GRANTED BECAUSE THE PANEL'S DETERMINATION THAT THE STATUTES ARE CONTENT NEUTRAL CONFLICTS WITH SUPERVENING SUPREME COURT PRECEDENT. *Reed v. Town of Gilbert*, No. 13-502 (U.S. Sup. Ct. June 18, 2015).

On June 18, 2015, the Supreme Court issued its decision in *Reed,* setting forth the proper analysis for determining whether a regulation of speech is content based or content neutral. The panel's finding that the statutes are content neutral, directly conflicts with this newly issued precedent.

The Court in *Reed* held that a town ordinance creating distinctions in sign regulations based on a sign's content–"temporary directional signs" being treated "less favorably" than ideological signs and political signs–was a content-based regulation of speech, subject to strict scrutiny. *Reed,* slip op. at 1.

It explained in determining whether a regulation is content based or content neutral, a court must first look at "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys"; if it does, that ends the inquiry. *Id.* at 6.

Turning to the ordinance before it, the Court found:

> On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

Id. at 7.

The court of appeals had, however, found the ordinance to be content neutral based on the town's content-neutral justifications for it and lack of hostility toward the regulated speech. *Id.* at 5. The Court rejected that approach:

> But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech.

Id. at 8 (citation omitted).

The Court also held that the lower court's reliance on *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), to justify its use of intermediate scrutiny, was misplaced:

> The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban....But *Ward*'s framework "applies only if a statute is content neutral."...Its rules thus operate to "protect speech," not "to restrict it."

Id. at 9-10 (emphasis *sic*) (citations omitted).

The federal criminal statutes at issue here are content based on their face. They single out for regulation, a particular category of expression: visual depictions of sexually explicit conduct. In addition, they distinguish between categories of sexual imagery based on content in the same way the town ordinance in *Reed* distinguished between signs based on their content: expression depicting ***actual*** sexual conduct is

treated much less favorably than expression depicting ***simulated*** sexual conduct. 18 U.S.C. § 2257A (h).

In the first appeal, the panel rejected Plaintiffs' argument that the statutes were content based. *Free Speech Coalition v. Attorney General*, 677 F.3d 519, 533-34 (3rd Cir. 2012) ("*FSC I*").[1] Not having the benefit of *Reed's* analysis, it began by noting,"a principal consideration" in distinguishing between content-based and content-neutral restrictions is "'whether the government has adopted a regulation of speech because of disagreement with the message it conveys,' or adopted the regulation for some other purpose collateral to the protected speech." *Id.* at 533, *citing Ward*, 491 U.S. at 791. "'The government's purpose,'" the panel wrote, again citing *Ward*, "'is the controlling consideration.'" *Id.* It reasoned:

> Congress singled out the types of depictions covered by the Statutes not because of their effect on audiences or any disagreement with their

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[1] The panel's ruling that the statutes were not content based, but content neutral, constituted the law of the case, binding on all subsequent panels. *In re City of Philadelphia Litigation*, 158 F.3d 711, 717-18 (3rd Cir. 1998); 3rd Cir. I.O.P. 9.1. *See Free Speech Coalition v. Attorney General,* No. 13-3681 (3rd Cir. May 14, 2015) ("*FSC II*") at 14. Thus, the panel continued to employ intermediate scrutiny in the second appeal.

The panel's ruling on this issue in the first appeal is not binding on the en banc Court, however, under the law-of-the-case doctrine. 3rd Cir. I.O.P. 9.1; *See e.g., Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 281 (3rd Cir. 2004) (en banc). And given the supervening decision in *Reed* repudiating the very basis underlying the earlier panel's rejection of Plaintiffs' contention that the statutes were content based, the panel may now also revisit its decision on that issue, as an exception to the law-of-the-case doctrine. *Zichy v. City of Philadelphia*, 590 F.2d 503, 508 (3d Cir. 1979).

> underlying message but because doing so was the only pragmatic way to enforce its ban on child pornography. Any impact by the Statutes on Plaintiffs' protected speech is collateral to the Statutes [*sic*] purpose of protecting children from pornographers....The Statutes serve purposes unrelated to the content of Plaintiffs' protected speech–namely the protection of children against sexual exploitation and the elimination of child pornography. That a statute refers to the content of Plaintiffs' protected expression does not necessarily render it content based.

Id. at 534.

The panel went on to conclude:

> To demonstrate that a restriction is content based and thus subject to strict scrutiny, Plaintiffs must show that the Statutes single out speech for special treatment because of the effect that speech will have on its audience.

Id. But that conclusion cannot survive *Reed*.

The panel also found the statutory distinctions between depictions of actual sexual conduct and simulated sexual conduct were not content based because they were "not enacted solely because of any disagreement with the message conveyed by that content." *Id.* at 535 n.11. Again, that conclusion cannot survive *Reed*.

Under the analysis required by *Reed*, the statutes are content-based regulations of speech, subject to strict scrutiny, which they cannot satisfy. Rehearing should be granted to evaluate their constitutionality in light of *Reed.*

II. REHEARING SHOULD BE GRANTED BECAUSE THIS CASE IS OF EXCEPTIONAL IMPORTANCE, AND THE PANEL'S DECISION CONFLICTS WITH *McCullen*, 134 S.Ct. 2518; *Stevens*, 559 U.S. 460; and *Conchatta*, 458 F.3d 258.

Millions of adult Americans are unwitting felons. Their crime? They have sent

constitutionally protected sexually explicit photos of themselves to their partners on their cell phones, made bedroom videos of their sexual intimacies, or posted explicit messages on social networking websites, without complying with the recordkeeping and labeling requirements of 18 U.S.C. §§ 2257, 2257A. They, therefore, face the risk of prosecution for a federal crime.

The statutes and their implementing regulations require anyone–a husband, a wife, a fine art photographer, a sex educator, a documentary film maker–who produces a sexually explicit image, to obtain photo identification from those depicted, create a record that includes a copy of the expression and photo ID together with other personal information about the persons depicted, create an index and cross-reference system for those records, label the imagery with the address where the records are located, and make those records available for inspection by the government on demand. Failure to comply with any of these mandates is punishable by a term of imprisonment of between one to five years, depending on whether the expression depicts simulated or actual sexual conduct.

Congress enacted the statutes to address a perceived risk that adult film producers, who used youthful-looking performers in their productions, might intentionally or inadvertently use underage performers in their films. The recordkeeping and labeling requirements were intended to provide law enforcement with a ready means to distinguish minors from youthful-looking adults in this

material. *Child Protection and Obscenity Enforcement Act and Pornography Victims Protection Act of 1987: Hearing Before Senate Committee on the Judiciary*, 100th Cong. (1988) at 27, 37, 88, 298-99; Final Report of the Attorney General's Commission on Pornography (1986) at 620.

The very predicate for the statutes–that primary producers of adult films might intentionally or inadvertently use minors in their productions–proved flimsy, however. For decades, the adult industry denounced the use of minors in adult films for moral reasons, App. at 5847-48, 5564-66, and has rigorously employed measures to assure that their performers were adults for legal reasons, *see* 18 U.S.C. §§ 2251-2254, 2256, as well as for practical business ones. App. at 5571-73. Producers have long checked identification documents and secured model releases from their performers, as a matter of industry practice–since at least the early 1980s, before the statutes were enacted. App. 5566, 5845-47, 5853, 5943. During the span of 30 years, there have been only a handful of cases in which underage performers appeared in sexually explicit productions–each of whom gained access by use of a fake ID. App. 5567-70, 5855.

The statutes' record of enforcement discloses their inutility. Between 2002 and 2012, only ***nine*** prosecutions were brought under 18 U.S.C.§ 2257; ***no prosecution*** has ever been brought under 18 U.S.C. § 2257A. App. at 2434. In contrast, for the same period of time, nearly 4,000 prosecutions were brought for child pornography

offenses under 18 U.S.C. § 2252A, for which the success rate was "extremely high." App. at 2434, 6095.

Importantly, the statutes apply, not just to the category of sexually explicit speech underlying Congress's concerns–commercially produced material featuring youthful-looking adults–but, as the panel found, apply to the entire universe of sexually explicit expression, including purely private expression.

The panel acknowledged that the number of persons depicted in sexual imagery "to whom the Statutes apply, yet for whom requiring identification does not protect children, is not insignificant," *FSC II*, slip op. at 31, and further recognized "there is some substantial amount of private sexually explicit images that the Statutes burden unnecessarily." *Id.* at 43.Under existing precedent, those acknowledgments alone would suffice to justify striking down the statutory scheme as not narrowly tailored and overbroad. *See McCullen*, 134 S. Ct. at 2534-41 *quoting Ward,* 491 U.S. at 799 ("The government 'may not regulate expression in such a manner that a ***substantial portion*** of the burden on speech does not serve to advance its goals.'" (emphasis added)); *Conchatta*, 458 F.3d at 268 ("With respect to ordinary theater and ballet performances, concerts, and other similar forms of entertainment, however, the Commissioner provides no evidence that the Challenged Provisions [in a liquor regulation imposing restrictions on nude dancing] prevent harmful secondary effects, and we are exceedingly doubtful that they do. Without evidence of such a connection,

there is no state interest to justify a ***substantial fraction*** of the Challenged Provisions' scope." (emphasis added)).

While the Supreme Court has often relied on hypotheticals and information from amici outside the record in measuring a challenged law's invalid applications, *Stevens*, 559 U.S. at 476; *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2736 (2011); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 247 (2002), here Plaintiffs presented concrete evidence of their invalid applications at trial.

Plaintiffs presented evidence of the prevalence of videos made in the marital bedroom, intimate photos sent between lovers on their cell phones, images exchanged by email, sexual encounters on FaceTime and Skype, and personal photos shared with fellow subscribers on adult dating and social networking websites. App. at 880-934, 970-80, 998-1003, 1025-27, 1040-1567. They presented evidence of news stories with the photos of the sexual abuse at Abu Ghraib published by the *New Yorker* and *Wired*, App. 863-65, 862, documentaries that captured images of rape or genital mutilation, App. at 825-41, 869-79, depictions of sexual conduct in health and education materials, and artistic visual depictions of human sexuality. Plaintiffs' Ex. 74-108, 120-27, App. at 777-821. They produced examples of expression depicting people in their 40s, 50s, and 60s, whom no one would confuse as minors. App. at 1028, 1043, 1049, 2248. And they presented evidence showing between 56% and 80% of the adults depicted in their own expression were 26 years or older–many of

whom were in their 40s and beyond. App. at 1568-75, 5440, 5971-73, 6021-22.

The testimony of the government's experts also evidenced the statutes' overreach. Dr. Francis Biro, the government's expert on pubertal maturation, admitted on cross-examination that generally speaking, the age range where there might be confusion about whether someone *under* 18 might appear to be an *adult*, or whether someone *over* 18 might appear to be a *minor*, was between the ages of 15 and 24. App. at 5491-93. He further admitted nearly everyone who had reached the age of 30 would not be confused as a minor. App. at 5493.

Gail Dines, another of the government's experts, testified that only one-third of sexually explicit material on the most popular commercial websites depicts adults who are youthful looking enough to be confused as possible minors, App. at 5550–meaning that the amount of speech depicting performers for whom there was no such confusion and which is, therefore, unnecessarily burdened, is twice the amount of speech within their legitimate scope, as defined by the panel. That testimony alone demonstrates the statutes' overinclusiveness. *See McCullen,* 134 S.Ct. at 2540 ("[T]he government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier.").

In finding the statutes' overbreadth was not substantial, the panel excluded a number of invalid applications from its consideration. For instance, Plaintiffs

produced five volumes of sexually explicit personal messages and postings exchanged on adult dating websites and social media–expression created for personal use with no commercial purpose. App. at 2437-4432. But the panel refused to consider the statutes' application to this body of expression. In a footnote, it explained:

> Plaintiffs also relied on images posted on adult dating and social networking sites to prove the substantiality of private sexually explicit images. Because these images are publicly available, however, we doubt that the Government's interest is not advanced by the application of the Statutes to these images.

FSC II, slip op. at 44 n.17.

But that invalid application should have been considered in assessing the statutes' burdens on private, constitutionally protected expression. The millions of adults who subscribe to these sites have no commercial purpose in creating their videos or posting their explicit photos. *See e.g.,* App. at 666 (Adultfriendfinder.com: 41,752,482 members). Rather their videos and photos communicate personal information to other adult members of the site. The images in the member profiles on these dating and networking sites are no more public than–and just as private and personal as–those in the member profiles on Match.com. And requiring members of adult social networking sites to label their images with their home address, maintain their photo identification records, and make them available for inspection by the government in their homes, as the statutes require, is just as invasive as it would be,

indeed more so, to apply these requirements to American adults who post their images on EHarmony.

The panel also declined to consider examples of sexual imagery in news stories and documentaries, App. at 825-79, in educational materials on sexual health and well-being, Plaintiffs' Ex. 74-108, 120-27, and in erotic fine art, App. at 777-821, subject to the statutes' burdens, in assessing the substantiality of their overbreadth. It explained in the same footnote:

> Similarly, we see no difference between a sexually explicit image produced for artistic, educational, or journalistic purposes and an image produced for more expressly pornographic purposes with respect to whether the recordkeeping and identification helps to prevent the exploitation of children.

FSC II, slip op. at 44 n.17.

But the panel itself provided the difference between the two: it determined that commercially produced adult videos contained a "sizeable quantity" of youthful-looking performers in its production because that is one of the genres that is popular with consumers of adult media. *Id.* at 39. Therefore, there is an economic motive for the adult industry to produce films of that kind. But the same cannot be said of expression made for artistic, educational, or journalistic purposes. In fact, the evidence established, as the panel acknowledged, a substantial portion of persons depicted in the artistic and educational expression produced by Plaintiffs were at least 30 years old. *Id.* at 30.

The undercurrent running through the panel's analysis suggests that because it viewed the statutes' recordkeeping requirements as "minimal," their unconstitutional applications to protected speech was tolerable. *Id.* at 22-25, 32-34. But that conclusion is wrong as a factual matter, and as a constitutional one.

A news outlet that wishes to publish the abuses at Abu Ghraib, a wife who wishes to send a sexy photo of herself to her out-of-town husband, a 50-year old divorcee who wishes to post explicit photos of herself to an adult networking website, a photographer whose work includes nudes, must comply with each of the detailed recordkeeping, labeling, and inspection provisions of the statutes. If they do not, they stand subject to criminal prosecution. It is no defense that obtaining the requisite photo IDs is impossible; no defense that the persons depicted are all clearly adults; no defense that the expression is newsworthy, educational, or private.

Jeffrey Douglas, Chairman of the Board of Directors of the Free Speech Coalition testified that "perfection is the minimum standard to avoid committing a felony." App. 6124-25, 5582. In particular, Douglas described the nearly "insurmountable" problems encountered by secondary producers–e.g., website operators who publish material produced by an array of primary producers–in collecting and maintaining records and the requisite indices and cross-references, all of which present "overwhelming difficulty" in compliance, while in no way advancing the government's interests. App. at 5578-80. Secondary producers, who

simply reproduce or publish sexually explicit expression created by primary producers, are, by definition, in no position to use underage performers–intentionally or inadvertently–since they play no role in the creation of that expression.

Plaintiffs testified about the statutes' censorial effect: Carol Queen restricted her Dadaist collage art because of her inability to collect records for her work. App. at 5967-68, 5975-76. Betty Dodson and Carlin Ross removed 1,800 images from their genital art gallery for the same reason. App. 5560, 5981-88. Dave Levingston refrained from creating a photographic retrospective on the lives of prostitutes for the Kinsey Institute because the statutes prohibited him from assuring his subjects anonymity. App. 5871-74. David Steinberg could not distribute a Norwegian fine art photography magazine in the United States for which he serves as a representative because its European photographers do not keep the required records. App. 6011-12.

These burdens are not "minimal," but even if they were, that is no basis to excuse the statutes' unconstitutional overbreadth. The Court in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) explained:

> There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification.

III. REHEARING SHOULD BE GRANTED SO THE SUPREME COURT'S DECISION IN *CITY OF LOS ANGELES v. PATEL,* CAN BE TAKEN INTO ACCOUNT ON THE FOURTH AMENDMENT CLAIMS ADVANCED IN THIS CASE.

The panel correctly concluded that the regulation allowing warrantless record

inspections is unconstitutional under the Fourth Amendment. *FSC II*, slip op. at 61, 64-65.The Supreme Court's decision on June 22, 2015 in *City of Los Angeles v. Patel,* No. 13-1175 (U.S. Sup. Ct. June 22, 2015) confirms the correctness of that decision.

Patel, however, also confirms the correctness of Plaintiffs' argument that the statutes themselves–18 U.S.C. §§ 2257 (c),(f)(5); 2257A (c),(f)(5)–are facially unconstitutional under the Fourth Amendment. In *Patel*, the Court struck down as facially unconstitutional under the Fourth Amendment, a Los Angeles ordinance authorizing inspections of hotel records of guests that was in all material respects, identical to the statutes at issue here. The statutes as well as the regulation, therefore, should be declared unconstitutional under the Fourth Amendment.

Plaintiffs-Appellants respectfully request this Court to grant rehearing by the panel or the en banc Court for the reasons discussed above.

Respectfully submitted,

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– CERTIFICATE OF SERVICE –

A copy of the foregoing Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing En Banc was filed electronically on June 25, 2015. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ J. Michael Murray
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